In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1373

SEYMOUR LACOB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of having willfully attempted to evade and defeat his income tax for the year 1960, in violation of 26 U.S.C. 7201, and was sentenced to three years' imprisonment. The judgment of conviction was affirmed on appeal. *United States* v. *Lacob*, 416 F.2d 756 (C.A. 7). This Court denied certiorari. 396

U.S. 1059. Petitioner has served his sentence, having been released on parole in 1971. The present proceeding is brought under 28 U.S.C. 2255 to review once more the propriety of the judgment. The district court denied petitioner's motion (Pet. App. A) and the court of appeals affirmed the denial (Pet. App. B, C).

Although petitioner, an attorney, insisted on representing himself at the trial, his primary contention in this Court (Pet. 7-20, 22-24, 41) is that he was denied the effective assistance of counsel in violation of the Sixth Amendment. The court of appeals below, in passing on this contention, stated (Pet. App. 3a-4a):

> As to his self-representation, the petitioner was repeatedly cautioned by the trial court that, even though he was a lawyer, he would be well advised to engage counsel to assist him with the trial. Petitioner repeatedly spurned this advice.
>
> At one point, the trial court asked petitioner if his reason for discharging his attorney was financial. He replied that it was, along with other reasons. The trial judge then offered to appoint either someone from the Federal Defender's Office or the attorney he was discharging. Petitioner declined. * * *

A court does not have the authority to force counsel on an unwilling defendant when he knowingly, intelligently and voluntarily waives such assistance. *Sutton* v. *United States*, 352 F.2d 52 (C.A. 5).

Petitioner's contentions (Pet. 20-22) that the trial court failed to inquire about his knowledge of the nature of the charges against him, and failed to inform

him of possible defenses to the charge, were not raised in the court below and therefore need not be examined here. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16; *Duignan* v. *United States*, 274 U.S. 195, 200.

There is no substance in the arguments (Pet. 26-30) that the trial judge engaged in "improper judicial bargaining" and coerced petitioner into agreeing to certain stipulations. Neither of these allegations is supported by the record. Moreover, petitioner can hardly contend that he was improperly influenced by the judge's alleged "plea bargaining," for he entered a plea of not guilty and went to trial. As for the stipulations, the record affirmatively shows that petitioner voluntarily stipulated to the matters now complained of (Pet. 29) in order "to avoid all this waste of time" (Tr. 141).

Similarly, there is no merit in the argument (Pet. 42-46) that the trial judge abused his discretion in imposing sentence. Under the statute (26 U.S.C. 7201), petitioner could have received a five-year prison sentence, but he was actually sentenced to only three years. Since the sentence was within the limits authorized by Congress, it was well within the power of the court to impose and cannot be successfully attacked in an appellate court. *Putt* v. *United States*, 363 F.2d 369 (C.A. 5), certiorari denied, 385 U.S. 962; *Granger* v. *United States*, 275 F.2d 127 (C.A. 5); *Bryson* v. *United States*, 265 F.2d 9 (C.A. 9). Moreover, petitioner commenced serving his sentence on May 6, 1970, and was granted parole on April 20, 1971.

Practically all of petitioner's remaining contentions fall into the category of alleged trial errors, which do not amount to constitutional deprivations and, hence, are not properly raised under 28 U.S.C. 2255. *Gaitan* v. *United States*, 317 F.2d 494, 495 (C.A. 10); *McLester* v. *United States*, 306 F.2d 880, 881 (C.A. 10); *Margoles* v. *United States*, 407 F.2d 727, 735 (C.A. 7). However, none of these contentions is meritorious in any event.

Petitioner contends (Pet. 30-33) that the trial court erred in admitting evidence of tax evasion for years involved in the severed counts (which were not tried). It is settled that evidence showing a pattern of evasion is admissible on the issue of willfulness. *United States* v. *Northern*, 329 F.2d 794 (C.A. 6), certiorari denied, 377 U.S. 991; *United States* v. *Alker*, 260 F.2d 135 (C.A. 3), certiorari denied, 359 U.S. 906.

Petitioner argues (Pet. 33-35) that the trial court erred in disallowing side bar conferences, but the ruling against side bar conferences was made in response to a request by the prosecutor to hold one (Tr. 24), and petitioner never requested such a conference.

The arguments that the trial judge unduly restricted the testimony of reputation witnesses (Pet. 35-37), and that petitioner, who was sworn and testified in his own behalf, was compelled to testify against himself (Pet. 37-40), were raised in petitioner's direct appeal from his conviction and were determined adversely to him in that proceeding.

United States v. *Lacob*, 416 F.2d 756 (C.A. 7), certiorari denied, 396 U.S. 1059. In these circumstances, the contention need not be re-examined in this proceeding under Section 2255. *Baca* v. *United States*, 383 F. 2d 154, 156 (C.A. 10), certiorari denied, 390 U.S. 929; *Evans* v. *United States*, 346 F. 2d 512, 513 (C.A. 8), certiorari denied, 382 U.S. 881; *Medrano* v. *United States*, 315 F. 2d 361, 362 (C.A. 9); *Williams* v. *United States*, 365 F. 2d 21, 23 (C.A. 7).

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

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